

SEP - 2 2009

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 7
)	
DANNY ABNEY,)	
LAURIE GAIL ABNEY,)	CASE NO. 09-61866 - MHM
)	
Debtors.)	
<hr style="border: 0.5px solid black;"/>		
)	
ALLIED FINANCIAL CORPORATION,)	
)	ADVERSARY PROCEEDING
Plaintiff,)	NO. 09-6260
)	
v.)	
)	
DANNY ABNEY,)	
LAURIE GAIL ABNEY,)	
)	
Defendants.)	

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

The complaint in this adversary proceeding was filed May 4, 2009. On June 3, 2009, Defendants filed a motion to dismiss for failure to state a claim upon which relief can be granted. Plaintiff filed an amended complaint and a response to the motion to dismiss June 12, 2009. Defendants filed a motion to dismiss the amended complaint June 22, 2009. For the reasons set forth below, Defendants' motions to dismiss are denied.

In the original complaint, Plaintiff alleged it is in the business of providing accounts receivable financing and provided such financing to Professional Concrete Services, Inc. (“ProCon”). Plaintiff also alleged that Defendants are officers, directors and shareholders of ProCon and guaranteed the loan from Plaintiff to ProCon. Plaintiff alleged that the security agreement between Plaintiff and ProCon provided *inter alia* that Defendants would hold the proceeds from ProCon’s accounts receivable in trust for the benefit of Plaintiff. Finally, Plaintiff alleged that Defendants created and pledged false invoices to Plaintiff in an amount exceeding \$200,000. Plaintiff sought a determination that its claim against Defendants is nondischargeable under §523(a)(4) and (6).

Defendants’ motion to dismiss asserted that Plaintiff’s complaint failed to state a claim because it failed to identify the invoices Plaintiff asserted were fraudulent, failed to attach copies of the alleged fraudulent invoices to the complaint, failed to identify the funds paid by Plaintiff, failed to attach copies of checks or wire transfers of those funds, failed to allege Defendants were acting in a fiduciary capacity or to specify any acts of embezzlement or larceny, and failed to specify any willful or malicious acts committed by Defendants.

Plaintiff’s amended complaint addresses the matters raised in Defendants’ motion to dismiss. Plaintiff also added a contention that its claim against Defendants is nondischargeable under §523(a). Defendants’ motion to dismiss the amended complaint

asserts Plaintiff's amended complaint fails to comply with Bankruptcy Rule 7015 and that the addition of a claim under §523(a)(2) is time barred.

1. The Amended Complaint and Bankruptcy Rule 7015.

Bankruptcy Rule 7015 provides that no motion to amend is necessary if an amended complaint is filed before a responsive pleading is filed. For purposes of Bankruptcy Rule 7015, a motion to dismiss is not a responsive pleading. *Brewer-Giorgio v. Producers Video, Inc.*, 216 F. 3d 1281 (11th Cir. 2000). Therefore, Plaintiff was not required to file a motion to amend seeking court permission to file its amended complaint.

2. Timeliness of the added §523(a)(2) claim.

Rule 15(c) of the Federal Rules of Civil Procedure, incorporated in Bankruptcy Rule 7015 provides:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading....

Rule 15(c) and Bankruptcy Rule 4007 interact to allow an amendment asserting new grounds in a complaint to determine dischargeability to relate back to the date the original complaint was filed if the new grounds arose out of the same conduct, transaction or occurrence set forth in the original complaint. *Maes v. Herrera*, 36 Bankr. 693 (Bankr. D. Col. 1984). In Plaintiff's amended complaint, no new transactions or occurrences were

alleged, but a new legal theory was applied to the same facts. The test of relation back is whether the original complaint was sufficient to put defendant on notice of general wrong or conduct to which the amendment pertains. An amendment may add more facts. *Melohn v. Klein*, 31 BR 947 (Bankr. E.D. N.Y. 1983). The §523(a)(2) claim relates back to the date the original complaint was filed and is, therefore, timely filed.

3. Failure to state a claim.

Defendants do not concede that the amended complaint renders their motion to dismiss for failure to state a claim moot. Defendants rely upon *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007), specifically, “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, at 1949, *quoting Twombly* at 570. A complaint is plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*


Fed. R. Civ. Proc. 8, incorporated in Bankruptcy Rule 7008, provides that a complaint should set forth “a short and plain statement of the claim showing the pleader is entitled to relief.” Plaintiff’s original complaint provided such a statement with sufficient factual content to allow the court to infer, if the facts set forth are true, that Defendants are liable for the misconduct alleged. A complaint should contain factual allegations but need

not recite evidence. In the original complaint, Plaintiff alleged an agreement to which Defendants were parties. Plaintiff alleged that agreement imposed upon Defendants a fiduciary duty. Plaintiff alleged Defendants submitted fraudulent invoices to obtain funds from Plaintiff. Those facts are sufficient to state a claim under §523(a)(4) or (6). Additionally, the amended complaint alleges sufficient facts to render moot the motion to dismiss the complaint; accordingly, it is hereby

ORDERED that Defendants' motion to dismiss the complaint and motion to dismiss the amended complaint are *denied*.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Plaintiff's attorney, Defendants' attorney, and the Chapter 7 Trustee.

IT IS SO ORDERED, this the 14 day of September, 2009.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE